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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35873[1]

NORFOLK SOUTHERN RAILWAY COMPANY—ACQUISITION AND OPERATION—CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Digest:[2] In this decision, the Board authorizes, subject to conditions, the acquisition by Norfolk Southern Railway Company (NSR) of 282.55 miles of rail line, in New York and Pennsylvania, owned by the Delaware & Hudson Railway Company, Inc. (D&H).

Decision No. 6

Decided: May 15, 2015

On November 17, 2014, Norfolk Southern Railway Company (NSR or Applicant), a Class I railroad, filed an application seeking Surface Transportation Board (Board) approval under 49 U.S.C. §§ 11323-25 of NSR's acquisition and operation of 282.55 miles of rail line owned by Delaware and Hudson Railway Company, Inc. (D&H), a wholly owned, indirect subsidiary of Canadian Pacific Railway Company (CP). With that application, NSR also filed two notices of exemption to modify existing trackage rights agreements between NSR and D&H. On December 16, 2014, the Board issued Decision No. 1, which accepted NSR's acquisition application, determined that the proposed transaction is a minor transaction as defined by the Board's regulations, embraced the two related notices of exemption, and established a procedural schedule. The Board now approves, subject to conditions, NSR's acquisition application and allows the embraced notices of exemption to take effect on the effective date of this decision.

[1] This decision also embraces Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34209 (Sub-No. 1), and Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34562 (Sub-No. 1).

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

The rail lines subject to NSR's application, known as the D&H South Lines, consist of approximately 267.15 route miles of the D&H Freight Main Line between Sunbury/Kase, Pa., (milepost 752) and Schenectady, N.Y. (milepost 484.85), and 15.40 miles of the Voorheesville Running Track between Voorheesville Junction (milepost A 10.9) and Delanson, N.Y. (milepost 499/milepost A 26.320), for a total of 282.55 miles of line. NSR's application describes three primary benefits of the acquisition transaction: (1) the transaction would benefit shippers by aligning ownership of the D&H South Lines with the majority user of the lines (NSR), thereby improving service and increasing operating efficiencies; (2) the transaction would preserve and enhance competition in the Northeast surface transportation market; and (3) the transaction would preserve, and potentially increase, jobs on the D&H South Lines by integrating D&H employees with NSR operations and organically growing traffic on the lines.

The two embraced notices of exemption modify existing trackage rights agreements between NSR and D&H by removing certain existing trackage rights that are subject to the proposed acquisition while retaining others. The notice of exemption filed in FD 34209 (Sub-No. 1) provides for the modification of an existing trackage rights agreement granted by D&H to NSR. This modification would allow NSR to retain trackage rights over approximately 17.45 miles of rail line between milepost 484.85 ± in the vicinity of Schenectady, N.Y., and milepost CPF 467 in the vicinity of Mechanicville, N.Y., including the right to use tracks within D&H's Mohawk Yard. The notice of exemption filed in FD 34562 (Sub-No. 1) provides for the modification of the Saratoga-East Binghamton Trackage Rights Agreement granted by D&H to NSR. This modification would allow NSR to retain trackage rights between milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs, N.Y., and milepost CPF 484 at Schenectady. Both of these notices of exemption would remove from the respective trackage rights agreements rail lines that NSR would purchase under the acquisition transaction, and would allow NSR to retain necessary trackage rights over the remaining lines. Neither notice of exemption would provide for new trackage rights.

In Decision No. 1, served on December 16, 2014, and published in the Federal Register on December 22, 2014 (79 Fed. Reg. 76,446), the Board accepted for consideration NSR's application pursuant to 49 U.S.C. § 11325(a). Based on the information provided in the application, the Board classified the transaction as a "minor transaction" under 49 C.F.R. § 1180.2(c). Under § 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. The Board determined that, based on the application and the record at that time, the transaction would clearly not have anticompetitive effects and that, if any anticompetitive effects did exist, they would be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. The Board explained that its findings regarding

competitive impacts were preliminary and that it would give careful consideration to any claims that the transaction would have anticompetitive effects that were not apparent from the application and the record at that time.

Substantive comments and/or requests for conditions were filed by ten parties of record: District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM); the National Grain and Feed Association (NGFA); the New York State Department of Transportation (NYSDOT); the Saratoga and North Creek Railway (S&NC); the Buffalo & Pittsburgh Railroad, Inc. (BPRR), the Rochester and Southern Railroad, Inc. (RSR), and the Wellsboro and Corning Railroad, LLC (WCOR), collectively the Genesee and Wyoming Subsidiaries, Inc. (GWI Subsidiaries or GWI); PPL EnergyPlus LLC (PPL); Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY or Nasca); CNJ Rail Corporation (CNJ); and James Riffin (Riffin). Late-filed comments were filed by the East of Hudson Rail Freight Service Task Force (East of Hudson). Reply comments were filed by Applicant; D&H; CSX Transportation, Inc. (CSXT); New York New Jersey Rail, LLC (NYNJR); and Congressman Jerrold Nadler (Congressman Nadler). The Board received 127 additional supporting comments filed by various parties and NSR, comprising comments from 82 shippers, 28 short line railroads, and 17 public agencies and government officials, including 14 Members of Congress.[3]

PRELIMINARY MATTERS

January 5, 2015 Petition for Reconsideration

On January 5, 2015, SMART/TD-NY filed a petition for reconsideration of Decision No. 1. Because SMART/TD-NY has presented no new evidence that would materially affect Decision No. 1 and no evidence of material error in that decision, the Board denies the petition for reconsideration.

Background. SMART/TD-NY argues that the Board should find that D&H is an "applicant" that must submit additional information under 49 C.F.R. § 1180.6(a), based on alleged new evidence and material error in Decision No. 1. According to SMART/TD-NY, the new evidence is D&H's December 24, 2014 letter to the Board, in which D&H indicates that it

[3] The following Members of Congress submitted comments in support of the transaction, either individually or as joint comments: Senator Pat Toomey (PA); Senator Robert P. Casey, Jr. (PA); the Honorable Bill Shuster (PA-9); the Honorable Tom Marino (PA-10); the Honorable Charles Dent (PA-15); the Honorable Lou Barletta (PA-11); the Honorable Matt Cartwright (PA-17); the Honorable Pat Meehan (PA-7); the Honorable Chris Collins (NY-27); the Honorable Brian Higgins (NY-26); the Honorable Paul D. Tonko (NY-20); the Honorable Tom Reed (NY-23); the Honorable Richard Hanna (NY-22); and the Honorable Christopher Gibson (NY-19).

"is considered an 'applicant' under the Board's rules."[4] The alleged "material error is the absence of required applicant employee impact information, particularly that for D&H."[5] SMART/TD-NY claims that, if D&H were to be treated as an applicant, "considerable additional information" relating to labor impacts would have been required from D&H, specifically, the information required under 49 C.F.R. § 1180.6(a)(2)(v).[6] SMART/TD-NY states that such information is "required for a prima facie case" and that this proceeding should be halted until that information is submitted. SMART/TD-NY also raises concerns about the procedural schedule established in Decision No. 1, contending that the Board "basically rubber stamped" NSR's suggested procedural schedule and that the schedule creates an "expedited" process that was not adequately supported, is prejudicial, and "serves to deny the public due process."[7]

On January 7, 2015, NSR filed a reply to SMART/TD-NY's petition for reconsideration. With respect to SMART/TD-NY's claims of new evidence, NSR states that D&H is not an applicant under 49 C.F.R. § 1180.3(a), that D&H's December 24, 2014 letter to the Board describing itself as an applicant does not itself make D&H an applicant, and that D&H's subsequent letter to the Board on January 7, 2015, clarifies that "NS[R] is the 'applicant' in this proceeding, not D&H."[8] In addition, NSR argues that it has provided all of the labor impact information required under 49 C.F.R. § 1180.6(a)(2)(v), including information regarding impacts on D&H employees.[9]

With regard to SMART/TD-NY's objections to the Board's procedural schedule, NSR argues that the procedural schedule adopted here is "no different than that provided by 49 U.S.C.

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[4] D&H Letter to Cynthia Brown, Chief, Section of Administration (Dec. 24, 2014) 1.

[5] SMART/TD-NY Pet. for Reconsideration 3. The reconsideration standard, discussed further below, requires the Board to find, in part, that a prior Board decision contained material error, not that a party to a proceeding committed material error. The Board presumes that SMART/TD-NY intends to allege that it was material error on the part of the Board to issue Decision No. 1 accepting NSR's application with what SMART/TD-NY alleges is insufficient employee impact information.

[6] 49 C.F.R. § 1180.6(a)(2)(v) requires applications filed under 49 U.S.C. § 11323 to include information regarding "[t]he effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached."

[7] SMART/TD-NY Pet. for Reconsideration 5-6.

[8] D&H Letter to Cynthia Brown, Chief, Section of Administration (Jan. 7, 2015) 1.

[9] See NSR Reply to SMART/TD-NY Petition for Reconsideration (NSR-11) 4.

§ 11325 and schedules adopted in prior minor transactions."[10] NSR further asserts that SMART/TD-NY cannot demonstrate that the procedural schedule is prejudicial, as SMART/TD-NY "has been fully aware of the proceeding and is an active participant," and so cannot claim that it has not had an opportunity to participate.[11]

Discussion and Conclusions. A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). See generally Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Dec. 30, 2014). Where, as here, a petition alleges material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R. FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 8 (STB served Nov. 8, 2012).

Allegation of New Evidence. Contrary to SMART/TD-NY's assertion, D&H's December 24 letter describing itself as an "applicant" does not constitute new evidence (even assuming that D&H had not filed its subsequent January 7, 2015 letter correcting its earlier statement and noting that "NS[R] is the 'applicant' in this proceeding, not D&H"). The Board's assessment of which entities are applicants in a transaction is based on the applicable statutes and regulations. Under 49 C.F.R. § 1180.3(a), "[t]he term applicant means the parties initiating a transaction . . . ." NSR is the party that initiated the transactions underlying these proceedings. Moreover, as the party seeking to "purchase . . . property of another rail carrier" and to modify existing trackage rights over another rail carrier's line, NSR is the party that must obtain "the approval and authorization of the Board" in order to carry out the proposed transaction under the statute. 49 U.S.C. § 11323(a)(2) & (a)(6). Therefore, D&H is not an applicant here.[12] See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (STB served Nov. 26, 2007) (describing as

[10] Id. at 5.

[11] Id. at 6.

[12] SMART/TD-NY also appears to imply that D&H must be an applicant in these proceedings because the transaction is brought under 49 U.S.C. § 11323 instead of 49 U.S.C. §§ 10901-02, but provides no support for this assertion.

"applicants" the two parties that filed the application and sought Board approval to acquire property of, and control over, another rail carrier).[13]

Allegation of Material Error. The Board also finds that SMART/TD-NY has not substantiated its claims of material error. The Board properly found NSR's application to be complete, including with respect to the employee impact information required under 49 C.F.R. § 1180.6(a)(2)(v), and correctly accepted NSR's application as filed. SMART/TD-NY appears to seek reopening primarily to have the Board require D&H and NSR to submit more detailed labor impact information. However, SMART/TD-NY has failed to establish any deficiency in the employee impact information submitted with NSR's application, which included information about impacts on D&H employees.[14]

Furthermore, SMART/TD-NY has failed to demonstrate that the Board's procedural schedule is unnecessarily expedited or in violation of due process. The procedural schedule provides the full 180 days allowed under 49 U.S.C. § 11325(d) for the Board to consider the application and issue a decision and, thus, is not expedited. The procedural schedule is also similar to (or more prolonged than) the schedules adopted in other recent minor transactions. See, e.g., CSX Transp., Inc.—Joint Use—Louisville & Ind. R.R., FD 35523 (STB served Aug. 1, 2013) (setting a 157 day procedural schedule); Adrian & Blissfield R.R.—Continuance in Control—Charlotte S. R.R., FD 35498 (STB served May 18, 2011) (setting a 124 day procedural schedule); CSX Transp., Inc. & Del. & Hudson Ry.—Joint Use Agreement (CSXT/D&H Joint Use), FD 35348 (STB served May 27, 2010) (setting a 178 day procedural schedule); Mass. Coastal R.R.—Acquis.—CSX Transp., Inc., FD 35314 (STB served Dec. 21, 2009) (setting a 126 day procedural schedule).

SMART/TD-NY has clearly been aware of, and an active participant in, these proceedings, having submitted several filings. Because SMART/TD-NY has not presented any evidence that it has suffered actual harm as a result of the procedural schedule, SMART/TD-NY has not demonstrated that the procedural schedule violated its due process rights. As for SMART/TD-NY's claim that the procedural schedule "serves to deny the public due process" (emphasis added), the many (largely supportive) statements filed throughout this proceeding confirm affected members of the public have retained the ability to represent their own interests,

[13] In some previous acquisition transactions under 49 U.S.C. § 11323-25, the parties on both sides of a transaction have submitted the information required of applicants. See, e.g., Application of Massachusetts Coastal Railroad, LLC and CSX Transportation, Inc., at 3, Mass. Coastal R.R.—Acquis.—CSX Transp., Inc., at 3, FD 35314 (filed Nov. 24, 2009). The Board certainly accepts and reviews such additional information when it is submitted but does not require it.

[14] See NSR Application Vol. 1 (NSR-1 Vol. 1) 46-47, 79 (Verified Statement of John H. Friedmann 12), 118-19 (NSR Operating Plan, Exh. 15, 10-11).

and thus the Board's setting of a procedural schedule in Decision No. 1 did not deny the public any due process.

SMART/TD-NY's petition for reconsideration will be denied. SMART/TD-NY has not presented new evidence that would materially affect NSR's application or the Board's decision to accept that application, nor has SMART/TD-NY provided any evidence of material error in Decision No. 1.

January 13, 2015 Motion for Stay

On January 13, 2015, James Riffin filed a motion to stay Decision No. 1 and all further proceedings in this matter. Riffin's motion for stay will be denied.

Background. On December 30, 2014, Riffin filed a petition for review of Decision No. 1 with the United States Court of Appeals for the Third Circuit.[15] On January 12, 2015, Riffin filed a pleading arguing that the Board "lost jurisdiction over this proceeding" when Riffin filed his appeal with the Third Circuit; that "any further proceedings before the [Board] involving this proceeding . . . would be a nullity;" and that "this proceeding has been effectively stayed until further notice from the Third Circuit."[16] On January 13, 2015, Riffin filed a motion seeking to stay Decision No. 1 and all further proceedings in this matter, reiterating that, in his view, the filing of his petition for judicial review divested the Board of its jurisdiction over this proceeding.[17] Therefore, he argues, "the Board should stay the proceeding pending remand by the Third Circuit."[18]

On January 20, 2015, NSR filed a reply, arguing that the Board should deny Riffin's motion to stay because Riffin has not met the standard for granting a stay set out in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[19]

On May 11, 2015, the Third Circuit dismissed Riffin's December 30, 2014 petition for review of the Board's Decision No. 1, concluding that because Decision No. 1 was "not a final

[15] See James Riffin v. Surface Transp. Bd., No. 14-4839 (3d Cir. filed Dec. 30, 2014).

[16] James Riffin's Argument that the STB No Longer Has Jurisdiction Over Proceeding (JR-3) 2.

[17] James Riffin's January 13, 2015 Motion for Stay (JR-4) 1.

[18] Id. at 4.

[19] NSR Reply to James Riffin's Motion for Stay and Motion for a Protective Order (NSR-12) 4.

order," the court "must dismiss [Riffin's] petition for lack of jurisdiction."[20] Riffin v. Surface Transp. Bd., No. 14-4839, slip op. at 2 (3d Cir. May 11, 2015).

Discussion and Conclusions. Following the recent dismissal of all Riffin's pending petitions before the Third Circuit, Riffin has no basis to argue that the Board lacks jurisdiction over this acquisition proceeding. As such, Riffin's motion for stay will be denied.

Discovery

Riffin, in his comments in this proceeding, incorrectly argues that the Board has erred in failing to provide for discovery in its procedural schedule in this proceeding.[21] The Board's regulations clearly provide for discovery. See 49 C.F.R. § 1114.21. Per those regulations, "All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." See 39 C.F.R. § 1114.21(b). Thus Riffin could have served the parties in this matter with discovery requests at any time under the Board's regulations; to the Board's knowledge, he did not do so.

February 13, 2015 Petition for Leave to File Petition to Strike and/or for Alternative Relief

On February 13, 2015, SMART/TD-NY filed a petition for leave to file a petition to strike and/or for alternative relief with regard to NSR's January 21, 2015 submission of additional statements supporting the acquisition transaction. The alternative relief sought is the acceptance into the record of a responsive supplemental pleading, which it also submitted on February 13, 2015. SMART/TD-NY's petition for leave to file will be granted, but SMART/TD-NY's petition to strike and/or for alternative relief to file a responsive pleading will be denied.

Background. SMART/TD-NY states that, although petitions to strike NSR's January 21, 2015 submission were due by February 10, 2015 under the Board's regulations, SMART/TD-NY should be allowed to file its petition to strike late because NSR's submission caused "considerable confusion and unfairness" and SMART/TD-NY thus had to "evaluate whether to seek to strike some of this improper material . . . and/or to seek alternative relief of its

[20] The Third Circuit also dismissed two other petitions filed by Riffin with respect to this acquisition proceeding, thus terminating all pending federal-court appeals of this matter. See Riffin v. Surface Transp. Bd., No. 15-1302, slip op. at 2 (3d Cir. May 11, 2015) (dismissing Riffin's petition for review of the Board's January 14, 2015 decision in this matter); In re: Riffin, No. 15-1615, slip op. at 1-2 (3d Cir. May 11, 2015) (dismissing Riffin's petition for a writ of prohibition to stay all Board proceedings in this matter).

[21] James Riffin's Preliminary Comments and Verified Statement (JR-2) 6.

own . . . ."[22] In its petition to strike and/or for alternative relief, SMART/TD-NY argues that NSR's January 21, 2015 submission of additional statements in support of the acquisition transaction should be struck, or, in the alternative, the Board should consider SMART/TD-NY's supplemental submission.[23]

SMART/TD-NY argues that NSR's January 21, 2015 submission is unusual, contrary to Board procedures, and "in manifest violation" of the procedural schedule in this matter; and it complains that opponents to the transaction were not given an opportunity to respond to the submission.[24] SMART/TD-NY also calls into question the Board's handling of this proceeding, describing it as "bizarre," and implying that the Board has ulterior motives that relate to CP interchange issues near Chicago.[25] SMART/TD-NY states that it offers its supplemental submission "to bring out one of the various CP affiliation proposals and thoughts prevalent in the fall of 2014 . . . ."[26] It also argues that this submission "is proper inasmuch as it involves one of the applicants[,] D&H, a wholly owned CP subsidiary."[27]

On February 27, 2015, D&H filed a reply to SMART/TD-NY's petition. D&H argues that SMART/TD-NY's petition is "untimely, without merit, and objectionable,"[28] and that "indecision . . . does not constitute good cause" to accept SMART/TD-NY's late-filed petition.[29] D&H further argues that the Board should not strike NSR's January 21, 2105 submission because the January 21, 2015 deadline set by the Board allowed for the filing of comments

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[22] SMART/TD-NY Petition for Leave to File Petition to Strike and/or for Alternative Relief 3.

[23] This supplemental submission consists of: (1) an October 2014 news article about an interview with CP's Chief Executive concerning CP's business plans near Chicago; (2) several pages of an internet discussion board, in which anonymous individuals discuss the October 2014 news article and speculate that NSR might seek to acquire some of D&H's rail lines in relation to potential business dealings between CP and NSR in the Chicago area; and (3) three Board news releases issued in April and May 2014 regarding public meetings held by the Board's Rail Customer and Public Assistance Program in May and June 2014 in Sioux Falls, South Dakota, Bloomington, Minnesota, and Malta, Montana.

[24] SMART/TD-NY Petition to Strike and/or for Alternative Relief 3, 6.

[25] Id. at 4-5.

[26] Id. at 6.

[27] Id. at 7.

[28] D&H Reply to SMART/TD-NY Petition for Leave to File Petition to Strike and/or for Alternative Relief 3.

[29] Id. at 4.

generally.[30] D&H also argues that SMART/TD-NY's supplemental submission should be rejected because the material in the submission is not offered in response or rebuttal to NSR's January 21, 2015 submission[31] and, contrary to 49 C.F.R. §1104.8, the material is "derogatory and/or contain[s] baseless speculation, supposition, and innuendo" (with regard to the internet discussion board pages) or is "entirely irrelevant and immaterial to the Board's consideration of NSR's application" (with regard to the three Board news releases).

On March 4, 2015, NSR filed a reply in opposition to SMART/TD-NY's petition. NSR argues that SMART/TD-NY has not established good cause for its late-filed reply.[32] NSR also argues, like D&H, that the Board's January 21, 2015 deadline was for the filing of comments generally[33] and that SMART/TD-NY's request to include the information in its supplemental submission should be denied pursuant to 49 C.F.R. §1104.8. NSR notes that the supplemental submission contains information related to rail service in the Chicago area that is "wholly irrelevant to the Transaction before the Board," which "relates only to rail lines in Pennsylvania and New York."[34]

Discussion and Conclusions. Under 49 C.F.R. § 1104.13(a), a motion addressed to a pleading is due 20 days after the pleading is filed with the Board. Under 49 C.F.R. §1104.8, "[t]he Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document."

SMART/TD-NY's petition to strike and/or for alternative relief was filed out of time, but in the interests of a complete record the Board will accept SMART/TD-NY's petition. As discussed below, however, the relief requested will be denied.

SMART/TD-NY's petition to strike NSR's January 21, 2015 submission is based upon its view that the Board's comment deadline applies only to comments in opposition to an application, and that comments in support of an application may only be filed alongside an application when it is originally filed. In fact, the relevant statute generally provides that

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[30] Id. at 6.

[31] Id. at 4, 5.

[32] NSR Reply in Opposition to SMART/TD-NY Petition for Leave to File Petition to Strike and/or for Alternative Relief (NSR-15) 4. NSR also argues that SMART/TD-NY's petition to late file should be rejected because it "would prejudice numerous other parties to this proceeding who have requested the Board's 'expedited review and approval' of the Transaction . . . ." Id. at 4-5.

[33] Id. at 5-6.

[34] Id. at 7.

"[w]ritten comments about an application" may be filed within 30 days after the notice of an application is published. 49 U.S.C. § 11325(d)(1). Moreover, the Board's procedural schedule in Decision No. 1 set a deadline for "[a]ll comments, protests, requests for conditions, and any other evidence and argument in opposition to the application." Because the statute and Decision No. 1 are broad enough to encompass comments in support of the application, SMART/TD-NY's petition to strike is denied.

We will deny SMART/TD-NY's petition for alternative relief under 49 C.F.R. § 1104.8. The information contained in SMART/TD-NY's supplemental submission is irrelevant and immaterial to our consideration of NSR's application. The supplemental submission relates to rail service in the Chicago area and is not in any way relevant to the Board's consideration of NSR's purchase of the D&H South Lines. Moreover, contrary to SMART/TD-NY's assertions, the Board's handling of this matter has been entirely consistent with the requirements of 49 U.S.C. § 11325(d), the Board's regulations, and past Board precedent.

The Board will also deny SMART/TD-NY's petition for alternative relief because, based on the dates of the supplemental material, all of the information was available to SMART/TD-NY when it filed its original comments.[35] The information contained in SMART/TD-NY's supplemental submission does not serve to rebut any information contained in NSR's January 21, 2015 submission, but instead raises an issue that SMART/TD-NY could have raised—but did not—in its original comments.

April 22, 2015 Motion to Compel

On April 22, 2015, SMART/TD-NY, filed a motion to compel production of a track lease agreement between NSR and Indiana Harbor Belt Railroad (IHB) concerning rail line in the vicinity of Chicago. SMART/TD-NY's motion to compel will be denied.

On April 1, 2015, the Board served a verified notice of exemption in Indiana Harbor Belt Railroad Co.—Lease & Operation Exemption—Rail Line of Norfolk Southern Railway, FD 35910, for IHB to lease and operate .87 miles of rail line in Cook County, Ill. from NSR. On April 8, 2015, SMART/TD-NY sent to NSR a discovery request in FD 35873, the present acquisition proceeding regarding NSR's purchase of the D&H South Lines, requesting a copy of the IHB/NSR lease agreement described in FD 35910. On April 13, 2015, NSR objected to SMART/TD-NY's request, arguing that the IHB/NSR lease agreement is not relevant to the present proceedings in FD 35873.

[35] The news article is dated October 2, 2014; the internet discussion board excerpts are dated October 3 and October 4, 2014; and the Board news releases are dated April 29, 2014, May 2, 2014, and May 23, 2014. NSR filed its application on November 17, 2014, and SMART/TD-NY's initial comments in opposition to the transaction were filed January 21, 2015.

SMART/TD-NY argues that the Board should compel production of the IHB/NSR lease agreement in this proceeding, FD 35873, because the .87 miles of rail line subject to that lease are "in the vicinity of [junction] CP 502," and CP 502 is mentioned in NSR's application here.[36] SMART/TD-NY argues that the leasing of the rail line subject to FD 35910 may be an inducement for NSR's purchase of the D&H South Lines or "may avoid any necessity for approval of the NS/D&H transaction,"[37] although SMART/TD-NY does not further explain this allegation/suggestion.

On May 12, 2015, NSR replied in opposition to SMART/TD-NY's motion, arguing that the IHB/NSR lease agreement is not relevant to this proceeding, and that SMART/TD-NY has not shown how any information contained in the lease would affect the outcome of this proceeding.[38] NSR further argues that even the lease were relevant, there are no further procedural opportunities for filings in which SMART/TD-NY could present arguments related to the lease.[39]

We will deny SMART/TD-NY's request. The lease agreement between IHB and NSR subject to FD 35910 is not relevant to our consideration of NSR's application in this proceeding, FD 35873. The rail line subject to the IHB/NSR lease agreement is clearly geographically distinct from the D&H South Lines, and in addition there is no evidence that the line subject to that lease will be in any way affected by NSR's acquisition of the D&H South Lines. Like SMART/TD-NY's February 13, 2015 supplemental submission in this docket, discussed above, SMART/TD-NY's request here relates to rail service in the Chicago area and is in no way relevant to the Board's consideration of NSR's purchase of the D&H South Lines. In addition, as NSR correctly notes, the evidentiary period in this proceeding closed on March 31, 2015, pursuant to the procedural schedule set by the Board in Decision No. 1.

May 14, 2015 Motion to Stay

On May 14, 2015, Riffin filed a motion to stay this decision,[40] and an "open letter" to the Board and Parties of Record,[41] arguing that the Board should stay issuance of its final decision in

[36] SMART/TD-NY Motion to Compel Production of Chicago Lease Agreement 6.

[37] Id. at 7.

[38] NSR Reply in Opposition to Motion to Compel 2, 4.

[39] Id. 2-3.

[40] In his motion, Riffin refers both to the Board's "scheduled May 19, 2015 decision" and the Board's "May 15, 2015 decision." Pursuant to the procedural schedule set in Decision No. 1, the Board's final decision in this proceeding (this decision) is due May 15, 2015. Where (continued . . .)

this matter for one week because Riffin has proposed settlement with NSR and D&H.[42] NSR opposed Riffin's motion on May 14, 2015, stating that Riffin has not met the standard for issuing a stay; that NSR opposes a voluntary stay; and that NSR is not amenable to Riffin's settlement proposal.

While Riffin has styled his motion as one "to stay" this decision, his motion was filed prior to issuance of the Board's final decision. As such, we will construe Riffin's motion as one to extend the deadline for issuance of the Board's final decision. However, pursuant to 49 U.S.C.§ 11325(d)(2), the Board is statutorily required to issue a decision in this matter no later than 180 days after NSR filed its application. That 180-day deadline is May 15, 2015. Riffin has failed to provide any basis for extending this statutorily-mandated deadline. To the extent any possibility for settlement discussions exists between the parties here, this decision, which will not become effective until June 15, 2015, does not preclude those settlement discussions from continuing. Riffin's motion to stay is therefore denied.

DISCUSSION AND CONCLUSIONS

Statutory Criteria

Under 49 U.S.C. § 11323(a)(2), a purchase, lease, or contract to operate property of one rail carrier by another rail carrier requires prior Board approval under 49 U.S.C. § 11324. Here, NSR seeks to purchase property of D&H, namely, the D&H South Lines. Because this transaction does not involve the merger or control of two or more Class I railroads, it is governed by § 11324(d), which directs us to approve the application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

(. . . continued)
Riffin refers to a May 19 decision, we will presume Riffin intends to refer to this May 15, 2015 decision.

[41] Riffin's motion to stay and open letter both refer to a pleading that Riffin states Mr. Eric Strohmeyer "will be filing," presenting arguments Riffin seems to rely on in his motion. On May 15, 2015, Strohmeyer filed a petition to intervene and reply to Riffin's motion to stay, and Riffin filed a supplement to his motion to stay. Because these pleadings were filed on our statutory deadline under 49 U.S.C. § 11325(d)(2), they were filed too late to be addressed in this decision.

[42] James Riffin's Motion to Stay May [15], 2015 Decision 2. On March 19, 2015 D&H filed a verified notice of exemption for those discontinuances, discussed further below.

In assessing transactions subject to § 11324(d), our primary focus is on the anticipated competitive effects. We must approve the application unless there will be adverse competitive impacts that are both "likely" and "substantial." And, even if we were to find that there would be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions. See Paducah & Louisville Ry.—Acquis.—CSX Transp., FD 34738, Dec. No. 5, slip op. at 4 (STB served Nov. 18, 2005); Canadian Nat'l Ry.,—Control—Wisc. Cent. Transp. Corp., FD 34000, Dec. No. 10, slip op. at 10 (STB served Sept. 7, 2001); Kan. City S. Indus., Inc.,—Control—Gateway W. Ry. Co., FD 33311, slip op. at 4 (STB served May 1, 1997); CSX Corp.—Control—The Ind. R.R. Co., FD 32892, slip op. at 3-4 (STB served Nov. 7, 1996). Moreover, "harms caused by the [transaction] must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not '[transaction]-related' (i.e., pre-existing disadvantages that will neither be caused nor exacerbated by the [transaction])." Canadian Nat'l Ry.—Control—Duluth, Missabe & Iron Range Ry., (CN/DMIR) FD 34424, slip op. at 14 (STB served Apr. 9, 2004); see also Genesee & Wyo. Inc.—Control—RailAmerica, Inc.,, (GWI/RailAmerica) FD 35654, et al., slip op. at 3 (STB served Dec. 20, 2012).

Competitive Analysis

After considering the application and the full record in this proceeding, the Board finds that NSR's acquisition of the D&H South Lines from D&H is not likely to cause a substantial lessening of competition or create a monopoly or restraint of trade.[43] This is true even when taking into account D&H's planned discontinuances of trackage rights that connect to the D&H South Lines (D&H discontinuances), which are mentioned in NSR's application.[44] In addition, any anticompetitive effects that might be caused by this transaction, in the unlikely event they were to occur, would be outweighed by the public interest in meeting significant transportation needs, and are mitigated by the conditions imposed herein.

[43] The Board has identified one potential anticompetitive effect, discussed further below, which it will ameliorate by granting a build-out-contingent condition to one shipper.

[44] D&H filed a verified notice of exemption for those discontinuances on March 19, 2015. See Del. & Hudson Ry. Co.—Discontinuance Of Trackage Rights Exemption—In Broome Cnty., N.Y.; Essex, Union, Somerset, Hunterdon, & Warren Cntys., N.J.; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, & Philadelphia Cntys., Pa.; Harford, Baltimore, Anne Arundel, & Prince George's Cntys., Md.; the District of Columbia; & Arlington Cnty, Va. (D&H Discontinuances), AB 156 (Sub-No. 27X).

D&H Discontinuances. NSR's application states that D&H would be filing for authority to discontinue certain underutilized trackage rights over lines connecting to the D&H South Lines.[45] In the D&H Discontinuances proceeding initiated on March 19, 2015, D&H submitted a verified notice of exemption under 49 C.F.R. § 1152.50 (the two-year out-of-service exemption) to discontinue overhead and local trackage rights on approximately 670 miles of rail line owned and/or operated by NSR, Reading Blue Mountain and Northern Railroad Company (RBMN), CSXT, Consolidated Rail Corporation (Conrail), Wilkes-Barre Connecting Railroad Company, Pocono Northeast Railway, Inc., and National Railroad Passenger Corporation (Amtrak) in New York, New Jersey, Pennsylvania, Maryland, Washington, D.C., and Virginia. Notice of this exemption was served and published in the Federal Register on April 8, 2015 (80 Fed. Reg. 18,937). A decision extending the effective date of this exemption to June 15, 2015 was served on April 17, 2015.

Several parties have commented that the Board should embrace the D&H Discontinuances proceeding into this proceeding or consider the competitive effects of these discontinuances in considering NSR's application.[46] Though NSR and D&H both argue that D&H's trackage rights should be discontinued separate and apart from the line sale at issue in this proceeding, both NSR and D&H appear to acknowledge that the D&H discontinuances are not completely unrelated to NSR's proposed acquisition of the D&H South Lines. In fact, NSR's competitive analysis accounted for the impacts of the D&H discontinuances.[47]

Notice of the D&H Discontinuances was published because D&H met the requirements of the two year out-of-service exemption by certifying that no local traffic has moved over the trackage rights at issue in that proceeding for at least two years and that any overhead traffic can be rerouted. As a result, these D&H trackage rights may be discontinued regardless of whether the Board approves NSR's acquisition transaction. 49 C.F.R. § 1152.50(b). Because the authority for those discontinuances exists independently from the acquisition transaction, the Board has not embraced D&H's separately-filed discontinuances into this proceeding. However, as noted above, the Board extended the effective date of the exemption in that case to June 15, 2015, and served all the parties to this proceeding with the decision extending the effective

[45] NSR-1 Vol. 1 10 n.3, 27-8 & n.24. NSR's application also mentions D&H trackage rights over rail line owned by Reading Blue Mountain and Northern Railroad Company (RBMN) between Lehighton, Pa. and Taylor, Pa., "which rights NS[R] will seek to have assigned to it." See id. at 28 n.25. The Board awaits NSR's application for this assignment of trackage rights.

[46] These commenters include CNJ, Riffin, SMART/TD-NY, NGFA, GWI, PPL, and NYSDOT.

[47] NSR-1 Vol. 1 86-92 (Verified Statement of Curtis M. Grimm)

date.[48] This has ensured that all parties to this proceeding have notice of the D&H Discontinuances proceeding and the opportunity to participate in that docket. As discussed further below, because these discontinuances involve only trackage rights that have not been operated for at least two years and which (once amended and republished) could be discontinued independent of this transaction, they do not cast doubt on the Board's finding that the proposed acquisition transaction will have no likely and substantial anticompetitive effects that cannot be ameliorated by the imposition of conditions.[49]

Minor Transaction. Relying principally on the scope and alleged effects of the D&H discontinuances, several commenters (CNJ, Riffin, and SMART/TD-NY) have questioned the Board's initial classification of this transaction as minor in Decision No. 1. However, the parties objecting to the Board's "minor" classification have failed to support their argument that, even if the D&H discontinuances are considered, this transaction is of regional or national transportation significance. The D&H discontinuances concern voluntarily assumed trackage rights that have remained unused for at least two years (and, in some cases, for more than a decade).[50] Since Conrail was acquired by NSR and CSXT in 1998, D&H has faced stiff competition from two strong Class I carriers on the D&H South Lines, and D&H has determined that its connecting trackage rights are no longer economically justified.[51] The mere theoretical possibility that the D&H trackage rights might provide another competitive alternative is insufficient to establish anticompetitive effects. See 49 C.F.R. § 1180.2(b); Canadian Nat'l Ry. Co.,—Control—Wisc. Cent. Ltd., FD 34000, slip op. at 19 (STB served Sept. 7, 2001) ("An option that has not been used in 7 years appears to be 'competitive' only in the most theoretical sense."). Thus, even if the Board were to consider the D&H discontinuances in addressing commenters' concerns about the classification of the acquisition transaction, the acquisition transaction was properly

[48] In a decision issued on May 13, 2015, the Board placed the D&H Discontinuances proceeding in abeyance pending receipt of supplemental information from D&H.

[49] The Board also rejects commenters' allegations that approval of this acquisition transaction will result in a "de facto abandonment" of the trackage rights involved in the D&H discontinuances. D&H will retain the trackage rights sought to be discontinued until the exemption in AB 156 (Sub-No. 27X) becomes effective, or until the Board otherwise authorizes or serves notice of discontinuance of these trackage rights. D&H cannot be said to have abandoned trackage rights that it still retains by agreement (and to which it could connect—even after approval of the acquisition transaction—by negotiating private agreements for trackage or haulage rights over the D&H South Lines). Moreover, for at least the last two years, no local traffic has moved over the D&H trackage sought to be discontinued, and it appears that no shipper on those segments has sought access from D&H.

[50] D&H Reply, Verified Statement of James D. Clements 2-3 (filed Mar. 31, 2015).

[51] Id. at 2.

classified. Indeed, nothing in the record before us undermines the Board's conclusion that this transaction is a minor transaction.

Haulage, Marketing, and Rate Agreements. NSR's application states that NSR and D&H will be terminating "various marketing and rate agreements involving D&H operations south of Schenectady, NY (MP 485) and east of Buffalo, NY."[52] NSR states that the terminations of these agreements are not subject to Board approval, but NSR's competitive analysis nonetheless accounted for the impacts of these terminations.[53] One of these agreements to be terminated is the Southern Tier Haulage Agreement between NSR and D&H, under which NSR provides haulage to D&H over NSR's Southern Tier Line between Binghamton, N.Y. and Buffalo.[54] Some commenters requested conditions related to activity on the Southern Tier and discussed changes on the Southern Tier that may occur as a result of the termination of the Southern Tier Haulage Agreement. Other commenters argued that the Board should consider the effects of all of these agreements in considering NSR's application. The Board notes that these haulage, marketing, and rate agreements, including the Southern Tier Haulage Agreement, were not subject to Board approval when the parties entered into them, and they will not be subject to Board approval if and when the parties decide to terminate them. Furthermore, no shipper that may be affected by the termination of these agreements has opposed this transaction or raised concerns with regard to the competitive effects of these agreements.

Competitive Effects of the Transaction. Generally, the Board focuses on preserving competition between two rail carriers; it protects against "2-to-1" reductions in competition, but in minor transactions it does not generally remedy transaction-related reductions of competitive options from three carriers to two carriers absent a showing of specific harm. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Merger 1996), 1 S.T.B. 233, 351 (STB served Aug. 12, 1996) (stating that the Board has "focused usually on preserving two-railroad competition, not on preserving three-railroad competition").[55] The Board has not historically

[52] NSR-1 Vol. 1 10. See also id. at 28-9.

[53] See NSR-1 Vol. 1 90-1 (Grimm V.S. 8-9).

[54] See id. at 73 n.3 (Friedmann V.S. 6 n.3).

[55] In Major Rail Consolidation Procedures, 5 S.T.B. 1, 8-11 (2000), 5 S.T.B. 539, 545 (2001), the Board adopted a more aggressive competitive policy for major mergers providing that applicants in new major mergers would need to make an affirmative showing that their proposals would result in competitive enhancements. But that was because of the overwhelming impact on the entire national transportation system that would occur if the industry were to consolidate into two transcontinental carriers, which the Board found would be the logical outgrowth of the next major merger transaction. That policy does not apply to minor transactions such as this one, which is not designed to rationalize the rail system by reducing excess capacity, but will instead improve the utilization of existing capacity.

acted to increase shippers' competitive options. See Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp., (BN/SF Merger 1995) 10 I.C.C.2d 661, 57 (1995). In addition, although a transaction may result in some general changes to competition for specific shippers, the Board seeks to protect competition overall, not specific competitors. See, e.g., Canadian Nat'l Ry. Co.,—Control—Ill. Cent. Corp., FD No. 33556, slip op. at 20 (STB served May 25, 1999); Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd., (Wisc. Cent/Fox Valley 1992) 9 I.C.C.2d 233, 239-40 (ICC served Dec. 4, 1992).

NSR submitted with its application and reply the Verified Statements of expert witnesses discussing potential competitive effects of this proposed transaction.[56] NSR's analysis took a "structural approach" to assessing competition, examining rail traffic data to determine whether shippers would experience a 2-to-1 reduction in independent, origin-to-destination (O-D) routing options for any particular commodity. NSR took a broad view of competition, assessing the effects of the acquisition transaction, the D&H discontinuances, and the termination or alteration of the NSR/D&H haulage, marketing, and rate agreements.[57]

NSR proposes to enter into two voluntary commercial agreements with D&H to preserve shippers' access to two carriers (NSR and D&H). The Transitional Divisions and Routing Agreement is intended to protect current shippers on the D&H South Line, keeping their pre-transaction contracts and rate authorities in place until they are amended, renewed, or allowed to expire. The Direct Short Line Access Agreement would protect current and potential shippers located on short lines that connect to the D&H South Lines, providing them with access (via haulage rights) to both NSR and D&H. This latter agreement would have an initial term of ten years, with renegotiation of the agreement at five-year intervals after the initial term.

We conclude that, if the Transitional Divisions and Routing Agreement and Direct Short Line Access Agreement are put in place, the acquisition transaction will not result in any likely, substantial anticompetitive effects that cannot be mitigated through the imposition of conditions. As an initial matter, it is worth noting that no shipper presently on the D&H South Lines (or on connecting short lines) has opposed the proposed acquisition transaction—indeed, over 80 shippers explicitly support it—which strongly suggests that the transaction will not cause substantial competitive harm. Moreover, the evidence shows that, with the implementation of the conditions required by this decision, including the two voluntary commercial agreements, which protect shippers on the D&H South Lines and connecting short lines from potential

[56] NSR-1 Vol. 1 67-81 (Friedmann V.S.); id. at 83-98 (Grimm V.S.); id. at 99-102 (Verified Statement of Bengt Mutén); NSR Response to Comments and Rebuttal in Support of Application (NSR-16) 44-54 (Rebuttal Verified Statement of Curtis M. Grimm); id. at 56-9 (Rebuttal Verified Statement of Bengt Mutén); id. at 61-6 (Verified Statement of Charles S. Tubman, Jr.); id. at 68-72 (Verified Statement of Robin Zehringer).

[57] Id. at 86-92 (Grimm V.S. 4-10);

disadvantageous modifications of service, the acquisition transaction will not result in any 2-to-1 reductions in shippers' routing options. Relying on NSR's waybills alone, NSR identified only four "potential" "2-to-1 corridors" (i.e., instances where independent O-D routing options are reduced from two to one as a result of the transaction). However NSR explains that these are not "true" 2-to-1 corridors, because three of the corridors have independent routing alternatives involving CSXT (a strong Class I competitor in the Northeast), and the fourth is more appropriately characterized as a 1-to-1 corridor because all routings involve the Montreal, Maine and Atlantic Railway (MM&A).[58] Because NSR's competitive analysis, as well as the Board's conclusion that this transaction will not result in any anticompetitive effects that cannot be mitigated by conditions, are both predicated on the implementation of the two voluntary commercial agreements, the Board will require NSR to implement the Transitional Divisions and Routing Agreement and Direct Short Line Access Agreement as a condition of our approval of the acquisition transaction.

One commenter, CNJ, presents the analysis of its expert, who argues that there are "over 150" shippers served by short lines connecting to the D&H South Lines who "effectively will experience 2-to-1 reductions in alternative rail carriers."[59] However, the Direct Short Line Access Agreement should prevent such 2-to-1 reductions, by giving those direct-short-line shippers access to both NSR and D&H (and D&H's network), for a minimum term of 10 years. CNJ appears to acknowledge that agreement, but seems to suggest that its effects are "limited" by the agreement's terms or by the terms of the Transitional Divisions and Routing Agreement, under which shippers on the D&H South Lines will retain access to both NSR and D&H until existing contracts are amended or allowed to expire.[60] However, CNJ fails to provide evidence that the alleged limitations of the two voluntary commercial agreements result in significant and likely anticompetitive effects, particularly given that no shipper on the D&H South Lines or on the connecting short lines has opposed the acquisition transaction or asserted a 2-to-1 reduction in available rail carriers.

CNJ's expert also criticizes NSR's structural analysis of competitive effects, asserting that the Board has in the past applied its "2-to-1 standard" to individual shippers on a line (not to O-D commodity flows), that NSR's analysis ignores source competition (i.e., product or

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[58] See id. at 90-92 (Grimm V.S. 8-10). With respect to the "1-to-1" corridor, because all routings must involve the MM&A—both before and after the proposed transaction—there was never more than a single "independent" routing for the subject traffic. See id. at 89-92 (quoting Consol. Papers, Inc. v. Chi. & N. W. Transp. Co., 7 I.C.C.2d 330, 338 (1991) (defining "independent routes" as "routes having no carriers in common")).

[59] Verified Statement of Michael A. Nelson 5, CNJ Objections and Request for Condition. See also id. at 2.

[60] See id. at 5 n.6.

geographic competition), and that NSR's focus on a single year's traffic does not adequately represent the effectiveness of alternative routes. But the affected shippers are overwhelmingly supportive of this transaction, and CNJ fails to demonstrate that NSR's approach is unreasonable under the circumstances of this case. Although the Board typically assesses whether a particular shipper will experience a 2-to-1 reduction in available rail carriers, CNJ's expert acknowledges that here "there is very little overlap between the service areas of the [D&H] and NS[R] systems"—a fact that diminishes the likelihood of 2-to-1 reductions for individual shippers.[61] And while NSR's expert did not examine every shipping point involved in the proposed transaction, he did conduct a point-by-point analysis in every case where concerns were raised by parties to this proceeding, and he found no significant anticompetitive effects. Moreover, any transaction may reduce source competition, but the Board does not typically mitigate such effects, particularly in minor transactions where (as here) an acquisition is likely to improve rail competition overall by replacing a struggling carrier with a stronger one. Finally, neither CNJ nor any other party has submitted any counter-analysis that would undermine NSR's competitive analysis, including its reliance on recent traffic data from a single, relevant year. As such, NSR's analysis is the best evidence of record.

The D&H discontinuances do not cast doubt on our conclusion that the proposed acquisition transaction, if conditioned as contained in this decision, will not have anticompetitive effects that are both likely and substantial. While the D&H discontinuances concern trackage rights over approximately 670 miles of rail line, the trackage rights have not been operated for at least two years. Where there has been no local traffic for at least two years, there is unlikely to be any anticompetitive effect in discontinuing trackage rights.[62] This is especially true because a discontinuance of trackage rights still leaves a line owner in place to conduct service.

Furthermore, the Board is charged with implementing Congress's longstanding policy to "reduce regulatory barriers to entry into and exit from the industry." 49 U.S.C. § 10101(7). The Board sees a competitive benefit in allowing a struggling carrier, such as D&H, to exit a market, to be replaced by a stronger carrier, such as NSR. The transfer of a line to a carrier that can operate the line more effectively than the existing carrier serves shipper and community interests by continuing viable rail service and increasing competition while allowing the selling railroad to eliminate service that it cannot operate economically. See Del. & Hudson Ry. Co., Inc.—

[61] See id. at 4. As NSR states, the acquisition is essentially end-to-end in nature, as the D&H South Lines connect with NSR-owned lines in only two locations: Sunbury, Pa. and Binghamton, N.Y. No shippers at either of those two locations are physically served by both NSR and D&H. NSR-1 Vol. 1 34; id. at 73 (Friedmann V.S. 6).

[62] Indeed, in assessing the acquisition transaction, NSR's expert considered potential competitive effects of the D&H discontinuances and nevertheless concluded that the acquisition transaction would not result in any true 2-to-1 corridors. NSR-1 Vol. 1 90-92 (Grimm V.S. 8-10).

Discontinuance of Trackage Rights—in Susquehanna Cnty, Pa. & Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie, & Genesee Cntys, N.Y., AB 156 (Sub-No. 25X), et al., slip op. at 11 (STB served Jan. 19, 2005) (concluding that discontinuance of D&H trackage rights will have a "positive" "net effect" on competition in the region). Here, the acquisition transaction and the D&H discontinuances would allow D&H to focus its resources on areas it believes are more profitable. This transaction also would give NSR greater incentive to invest in, maintain, and increase local traffic levels on the D&H South Lines, thereby providing more efficient service—an incentive that D&H does not have because it finds the operation of the D&H South Lines unprofitable.

We conclude that the acquisition transaction is not likely to cause a substantial lessening of competition or to create a monopoly or a restraint of trade. We have, however, identified one potential anti-competitive effect, discussed below, which we will ameliorate by granting one shipper a condition contingent on a build-out.

Public Benefits. Even if there were any anticompetitive effects of the acquisition transaction other than that ameliorated by the contingent condition discussed below—and the Board does not find any such effects—they would be far outweighed by the public benefits of this transaction.

D&H is a financially struggling operator seeking to exit the market served by the D&H South Lines. NSR is a much larger operator that is better situated to own and operate these lines. Over 80% of the current traffic on the D&H South Lines is NSR traffic, and this transaction would better align ownership of the Lines with their usage. NSR has the funds and incentive to purchase and invest in the D&H South Lines, and to potentially make improvements on the Lines. It is in the public interest to facilitate transactions that transfer control of a line to a carrier with a greater ability and incentive to ensure adequate investment in and growth of traffic on the line. See generally UP/SP Merger 1996, 1 S.T.B. 233. By allowing NSR to purchase and invest in the D&H South Lines, this transaction will allow NSR to provide more reliable service for shippers and to conduct safer and more efficient operations over the Lines than either D&H as a struggling owner or NSR as an operator without ownership rights could provide.

As both NSR and D&H point out, this transaction would also strengthen competition in the Northeast by replacing a smaller carrier operating at a loss with a larger carrier that is better equipped to operate the D&H South Lines.[63] NSR is one of the strongest carriers in the Northeast, along with CSXT. On the other hand, D&H's role in the northeast transportation market has been reduced by intermodal competition from motor carriers and by competition between NSR and CSXT since the Conrail split in 1998 and 1999. See Del. & Hudson Ry. Co., Inc.— in Susquehanna Cnty, Pa., slip op. at 2, 10. Allowing NSR to purchase the D&H South

[63] See id. at 12 and Reply Comments of D&H 9.

Lines will enable NSR to more effectively compete with CSXT. In addition, this transaction will allow NSR and rail transportation generally to provide more effective competition with other modes of transportation, such as trucking and barge, by making rail transportation via the D&H South Lines more efficient. The acquisition transaction will also remove inefficiencies plaguing NSR's use of Pan Am Southern's "fileting" and "toupéeing" facilities in Mechanicville, N.Y. by reducing D&H's involvement in the coordination of NSR's movements to those facilities.[64] This would allow NSR to more efficiently convert single-stack trains to double-stack trains and vice versa, and move double-stack trains between western locations and New England.[65]

The Board therefore finds that very strong public benefits would result from approving NSR's application to acquire the D&H South Lines.

Our conclusion that the transaction would not adversely affect competition and would create significant public benefits is reinforced by the extensive support for the transaction in the record; 127 supporting comments were filed by various parties and NSR, including comments from 82 shippers, 28 short line railroads, and 17 public agencies and government officials, including 15 Members of Congress.

Comments and Requests for Conditions

Under 49 U.S.C. § 11324(c), we have broad authority to impose conditions to ameliorate competitive harm that might result from the proposed transaction. See Kan. City S.—Control—The Kan. City S. Ry., FD 34342, slip op. at 16 (STB served Nov. 29, 2004); see also GWI/RailAmerica, slip op. at 4. In doing so, the harm caused by the transaction "must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . i.e., pre-existing disadvantages that will neither be caused nor exacerbated" by the transaction. CN/DMIR, slip op. at 14. See also GWI/RailAmerica, slip op. at 3. Furthermore, the harm must be to competition, not to a particular competitor. Canadian Nat'l Ry.—Control—Ill. Cent. Corp., (CN/IC) FD No. 33556, slip op. at 20 (STB served May 25, 1999) (stating that "[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival

[64] "Fileting" means converting double-stack intermodal trains into single-stack trains by removing the top containers, while "toupéeing" means converting single-stack intermodal trains into double-stack trains by placing containers on top of each single container. See NSR-1 Vol. 1 33.

[65] See NSR-1 Vol. 1 33-34; id. at 78-79 (Friedmann V.S. 11-12); id. at 115-16 (NSR Operating Plan).

of particular carriers."). The Board's conditioning power is thus "used to preserve competitive options (not to expand them)." BN/SF Merger 1995, 10 I.C.C.2d at 57.[66]

Ten commenters requested that we impose conditions on the proposed transaction. We now discuss the parties' requests for conditions in alphabetical order by commenter. Where multiple commenters raised similar issues, we address those issues by the first commenter alphabetically to raise the issue.

CNJ Rail Corporation and James Riffin. CNJ and Riffin—neither of which operates licensed rail service today—both request that CNJ be assigned trackage rights to allow CNJ to operate between D&H's Oak Island, N.J. terminal (which is located on a line subject to the D&H Discontinuances proceeding) and the Keystone Landfill in Scranton, Pa.[67] Both parties claim that this assignment is necessary to replicate competition with NSR that D&H previously provided over these lines.[68] Riffin also states that this will "preserve competitive access to two carriers for . . . two new shippers who desire rail service."[69] NSR objects to this request, arguing that: (1) D&H's current lack of service at Oak Island is a result of market conditions unrelated to the proposed acquisition transaction; (2) even without D&H's service, Oak Island will be served by two railroads: CSXT and NSR; and (3) CNJ's proposed traffic is "purely hypothetical."[70]

Riffin additionally requests that the Board grant to the State of Maryland or Riffin himself the use of D&H's trackage rights from south of Baltimore to a point of interchange with CSXT. Riffin states this would "eliminate[e] a major transportation problem for the Port of

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[66] In 2001 the Board implemented a more aggressive policy for major mergers, see supra n.55. That 2001 policy, however, does not apply to minor transactions such as this one.

[67] Specifically, Riffin requests that CNJ or Riffin be assigned: (1) the right to use D&H's Oak Island Terminal; and (2) trackage rights between Oak Island and "some point that will enable CNJ/Riffin to operate trains from Oak Island to the Keystone Landfill . . . [or] to operate trains from Oak Island to a point of interchange with [CP]. Riffin Supplementary Comments 5. CNJ requests CNJ be assigned: (1) D&H's trackage rights over NSR between Oak Island and Easton, Pa. or Allentown/Bethlehem, Pa.; and (2) overhead trackage rights over NSR between Easton and a point of connection with Delaware-Lackawanna Railroad near Portland, Pa., or in the alternative assignment of D&H's trackage rights between Oak Island and a point of connection with RBMN near Lehighton, Pa. CNJ Objections and Request for Condition 17-18.

[68] Id. at 18; Riffin Supplementary Comments 5-6.

[69] Riffin Supplementary Comments 5.

[70] NSR-16 25-26.

Baltimore."[71] NSR objects to this condition on the ground that there is no nexus between the requested condition and the proposed acquisition transaction.[72]

The Board will deny these requested conditions. CNJ and Riffin's requests related to Oak Island go far beyond what is necessary to address any anticipated adverse competitive effects of this proposed transaction. These requests do not seek to remedy a loss of competition, but instead seek to put CNJ in a position to conduct new operations where no current operations exist. Board-imposed conditions, however, are intended to preserve competitive options, not to expand them for a carrier seeking to enter the market or expand its current business. See BNSF Merger.[73]

As the Board has previously noted, as of 2008, CNJ did not own any rail assets or conduct any rail operations. Md. Transit Admin.—Petition for Declaratory Order, FD 34975, slip op at 2 n.3 (STB served Sept. 19, 2008). Even if CNJ had since acquired assets or begun conducting unlicensed operations, it would not be appropriate for the Board to use its conditioning power in this case to expand competitive options and improve the position of a single potential competitor, CNJ. Riffin is not a Board-licensed rail carrier either. Moreover, D&H has filed to discontinue its trackage rights in relation to Oak Island because they have not been used in over two years. It would be inappropriate for the Board to impose trackage rights conditions to seek to increase competition to levels of service that do not exist today. Where no traffic has moved in two years, there is unlikely to be any anticompetitive effect from discontinuing trackage rights. Finally, Riffin's request that either he or the State of Maryland be granted trackage rights to eliminate traffic near the Port of Baltimore does not seek to address any adverse impact this transaction may have and, as such, is denied.

East of Hudson Rail Freight Service Task Force. East of Hudson, a task force organized to increase rail competition east of the Hudson River in New York and Connecticut, filed comments (1) requesting leave to file out of time its notice of intent to participate and (2) asking the Board to assign to NSR trackage rights previously granted to D&H over CSXT-owned line between Mechanicville, N.Y. and Fresh Pond Junction, N.Y. East of Hudson states that these rights were assigned to D&H when NSR and CSXT acquired Conrail. See CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., (CSX/Conrail) FD 33388 (STB served July 23, 1998). East of Hudson argues that the Board should assign these trackage rights from D&H to NSR because D&H "has proved to be ineffective in meeting the goal of the Board articulated in

[71] Riffin Supplementary Comments 6.

[72] NSR-16 21.

[73] See supra discussion at nn.55 & 66.

the Conrail case," and East of Hudson believes that, with these trackage rights, NSR would be "a strong viable competitor within the East of Hudson region."[74]

New York New Jersey Rail, LLC (NYNJR), which operates in the East of Hudson region, Congressman Jerrold Nadler, and CSXT filed comments in response to East of Hudson's request.[75] NYNJR and CSXT argue that East of Hudson's request is improperly filed, NYNJR arguing that such a request should be filed in FD 33388, and CSXT arguing that East of Hudson's filing is actually a responsive application, which is not permitted in minor transactions. See 49 C.F.R. § 1180.24(d). NYNJR and Congressman Nadler additionally dispute East of Hudson's claims related to alleged rail service issues in the East of Hudson region.

In the interests of a complete record, the Board will grant East of Hudson's request for leave to file out of time, and accept into the record East of Hudson's filings. However, the Board will deny East of Hudson's request for a condition. East of Hudson asks the Board to assign to NSR trackage rights that are related to the Conrail acquisition, not this proceeding, and its request in no way relates to a competitive harm alleged to be caused by this proposed transaction. Moreover, East of Hudson's comments essentially constitute a responsive application that is prohibited in this minor transaction.

Genesee and Wyoming Subsidiaries, Inc. GWI has several subsidiary short line railroads that it claims will suffer competitive harms as a result of the proposed transaction. These subsidiary railroads connect to NSR's Southern Tier line, over which NSR and D&H currently have haulage, ratemaking, and marketing agreements (including the parties' Southern Tier Haulage Agreement) that would be terminated as part of NSR and D&H's proposed acquisition agreement for this transaction.[76] GWI claims that, if NSR terminates the haulage it provides to CP[77] over the Southern Tier, GWI's subsidiary short line railroads will lose traffic because their CP routings will become more complex (and thus, more expensive and less competitive) with the

[74] Application of E. of Hudson 2, 3.

[75] Congressman Nadler's submission included a petition to late file a notice of intent to participate. CSXT's submission included a petition to intervene for the limited purpose of responding to East of Hudson's comments. The Board will grant both petitions.

[76] Comments and Requests for Conditions of GWI Subsidiaries 13. See also NSR-1 Vol. 1 28-29.

[77] GWI's comments use the term "CP" to refer generally to Canadian Pacific Railway Company and all affiliates and subsidiaries, including D&H. The Board therefore uses the term "CP" here in describing GWI's requests. However, Board notes that, to the extent GWI requests the imposition of conditions on CP or any of its affiliates other than D&H, those entities are not parties to this proceeding and are thus not subject to our conditioning authority here.

addition of another carrier.[78] To remedy these alleged competitive harms, GWI proposes three conditions. First, GWI proposes that the Board should require NSR and CP, at their option, to maintain existing haulage arrangements over the Southern Tier, or, if NSR and CP elect not to maintain those arrangements, NSR should be required to provide haulage for each of the GWI subsidiaries over the Southern Tier.[79] Second, GWI proposes the Board should require modification of the Transitional Divisions and Routing Agreement to make its terms applicable to traffic moving to, from, and over the Southern Tier.[80] Third, GWI proposes the Board require that NSR and CP ensure that the rates or fees paid to the GWI Subsidiaries for traffic moving commercially through the GWI Subsidiaries and CP will not be reduced for three years from the date of the consummation of the transaction.[81]

NSR argues that the Board should deny all of GWI's requested conditions because they: (1) seek to address effects that arise from the termination of private agreements outside the Board's jurisdiction; and (2) seek to protect GWI's revenues instead of protecting competition.[82] NSR further argues that the Board does not have authority to impose conditions related to the termination of the Southern Tier Haulage Agreement.[83] NSR also notes that its expert considered the effects of termination of the Southern Tier Haulage Agreement and concluded that there will be no significant anticompetitive effects.[84]

The haulage agreements NSR and D&H seek to terminate over the Southern Tier are entirely voluntary and not subject to Board approval. See, e.g., Del. & Hudson Ry. Co., Inc.—in Susquehanna Cnty, Pa., slip op. at 11 (Board approval not required for the initiation or termination of haulage agreements "because such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place."). Because haulage agreements are not regulated by the Board, NSR and D&H could voluntarily terminate such agreements at any time, irrespective of this acquisition transaction. Moreover, no shipper on any of GWI's short lines—including the WCOR, which physically connects only to NSR's Southern Tier line—has opposed the proposed

[78] Comments and Requests for Conditions of GWI Subsidiaries 6-10.

[79] Id. at 3-4.

[80] Id. at 4. The Transitional Divisions and Routing Agreement preserves existing arrangements and rates for current customers on the D&H South Lines for the length of those current contracts.

[81] Id. at 4.

[82] NSR-16 21-22.

[83] Id. at 22.

[84] See id. at 24, citing id. at 50-52 (Grimm R.V.S. 7-9).

transaction or complained that it would make them a 2-to-1 shipper.[85] While the Board has, on rare occasions, imposed conditions to preserve haulage arrangements in major transactions having a significant effect on national or regional rail competition,[86] the Board does not find any need to do so here, particularly where no shipper has raised concerns about the termination of NSR haulage over the Southern Tier.

In addition, it is well settled that, in exercising its conditioning power, the Board seeks to protect competition, not individual competitors. See CN/IC, slip op. at 20 (stating that "[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers."); Wisc. Cent/Fox Valley 1992, 9 I.C.C.2d at 239-40 (denying request for haulage arrangements or pricing and service commitment authority where party's request centered on "traffic subject to diversion from its system," rather than on potential harm to competition). While the termination of the haulage, marketing, and rate agreements on the Southern Tier might increase the complexity of GWI's routing options by adding another carrier, GWI has not presented evidence that this change is actually anticompetitive. The Board expects that NSR will continue to work cooperatively with GWI and other carriers to maximize the timely and efficient handling of freight and ensure the fluidity of service in the region. However, the Board will deny all of GWI's requested conditions.

International Association of Machinists and Aerospace Workers, AFL-CIO and Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board. IAM states that if the transaction is approved, the Board should require the employee protection mandated in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc. (Wilmington Terminal), 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991). IAM also requests that the Board "specifically hold the applicant to the representations it has made in its application, and monitor the applicant's compliance with its obligations."[87]

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[85] NSR's analysis on rebuttal concludes (and GWI essentially admits) that shippers located on GWI's BPRR and RSR short lines would experience, at worst, a 4-to-3 or 3-to-2 effect, which the Board does not typically remedy, even where shippers actually raise such concerns (which has not occurred here). See NSR-1 Vol. 1 90-91 (Grimm V.S. 8-9); Comments of GWI Subsidiaries 6-10 (stating that BPRR can interchange traffic with NSR, CP, and CSXT at Buffalo, N.Y., and that RSR can interchange traffic with NS, CP, and CSXT).

[86] See UP/SP Merger 1996, 1 S.T.B. 233; CSX/Conrail.

[87] Comment of District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) 1. In a supporting statement submitted by NSR on January 21, 2015, several Members of Congress also requested the Board hold NSR to the

(continued . . .)

SMART/TD-NY requests that the Board impose the New York Dock employee protection conditions on the acquisition, if approved, rather than New York Dock as modified by Wilmington Terminal. SMART-TD/NY argues that the New York Dock employee protection conditions are appropriate because this transaction is factually different than the transaction in Wilmington Terminal.[88] SMART/TD-NY further argues that New York Dock alone should apply because "NSR and D&H operations have been coordinated."[89]

SMART/TD-NY also requests that if the embraced notices of exemption in FD 34209 (Sub-No. 1) and FD 34652 (Sub-No. 1) are not dismissed, the Board should impose the employee protective conditions set out in in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979). SMART/TD-NY argues that this is necessary because there are trackage rights contained in the original trackage rights agreements that will be effectively discontinued once these agreements are modified, and any adversely affected employees should be protected pursuant to Oregon Short Line.

Citing Board precedent, NSR argues that New York Dock, as modified by Wilmington Terminal, is the correct employee protective standard because this transaction is a line sale.[90] NSR further argues that Oregon Short Line only applies to discontinuances of trackage rights, and that any trackage rights in FD 34209 and FD 34652 that will be excluded from the amended agreements will not be discontinued but, rather, will be subsumed in the acquisition transaction. NSR argues that the employee protective conditions in Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980) (N&W/Mendocino) are appropriate in the FD 34209 (Sub-No. 1) and FD 34652 (Sub-No. 1) notices of exemption.

The Board will condition approval of the acquisition transaction on compliance with the employee protective conditions in New York Dock as modified by Wilmington Terminal. New York Dock applies to 49 U.S.C. § 11323 transactions involving "consolidations" (e.g., merger or common control) in which at least one entity will cease to exist as a separate entity and, as such, requires a single negotiated umbrella agreement covering all involved employees. Wilmington

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(. . . continued)
representations made in its application. See NSR Additional List of Supporting Parties and Submission of Statements in Support of the Transaction (NSR-13) 61.

[88] Nasca Verified Statement to SMART/TD-NY Opposition Statement 7.

[89] Id. at 8.

[90] NSR-16 35.

Terminal R.R.—Purchase & Lease—CSX Transp., Inc. Lines Between Savannah & Rhine, & Vidalia & Macon, Ga., 6 I.C.C.2d 799, 815-16 (I.C.C. served June 20, 1990). The umbrella agreement must outline how the two workforces will be combined, and must be negotiated prior to consummation of the transaction. Id. Wilmington Terminal modifies the New York Dock conditions by providing that no umbrella agreement is required for line sales under 49 U.S.C. § 11323. Under Wilmington Terminal, each side of the transaction negotiates with its own employees: seller negotiating solely with seller's employees, and buyer negotiating solely with buyer's employees. Id. In addition, the negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction.

This transaction is clearly a line sale under 49 U.S.C. § 11323(a)(2). Though D&H's rail footprint will shrink as a result of the sale of the D&H South Lines, the D&H discontinuances, and the termination of the marketing and rate agreements between NSR and D&H, D&H will continue to exist as a common carrier, separate from NSR. Accordingly, the correct employee protective conditions for this case are New York Dock as modified by Wilmington Terminal. Mass. Coastal R.R.—Acquis.—CSX Transp., Inc., (Mass. Coastal 2010) FD 35314 (STB served May 19, 2010) (stating that "[i]n approving line sales under [49 U.S.C.] §§ 11323-25 that involve a Class I rail carrier, the appropriate employee protection conditions under § 11326(a) are New York Dock, as modified by Wilmington Terminal."); see also Union Pac. R.R.—Acquis. & Operation Exemption—San Pedro R.R. Operating Co., FD 35666 (STB served Sept. 7, 2012); Union Pac. R.R.—Acquis. & Operation Exemption—Brownsville & Matamoros Bridge Co., FD 35791 (STB served March 13, 2014); BNSF Ry.—Acquis. & Operation Exemption—Neb. Ne. Ry., FD 35644 (STB served Oct. 18, 2012). Contrary to SMART/TD-NY's suggestion, this is the applicable standard regardless of the size of the railroads involved or the bargaining status of their employees. See Canadian Pac. Ltd—Control—Davenport, Rock Island & N. W. Ry., FD 32579, 6-7 (I.C.C. served Feb. 10, 1995); Wilmington Terminal, 6 I.C.C.2d at 815-16.

In addition, SMART/TD-NY's request that we impose Oregon Short Line over the modified trackage rights agreements will be denied. NSR is correct that Oregon Short Line does not apply to the modification of the trackage rights embraced here, as NSR does not need discontinuance authority for trackage rights that will be subsumed with the line sale transaction.[91] See Union Pac. R.R.—Amendment of Trackage Rights Exemption—BNSF Ry., FD 30868 (Sub-No. 1) (STB served July 20, 2006). The Board imposes employee protective conditions on trackage rights when a carrier is exiting the market. By purchasing the rail segments, NSR will be transforming and in fact enhancing its rights over those lines, rather than exiting or discontinuing service in a market. Further, any NSR employee potentially affected by NSR's change from "tenant carrier operator to owner carrier operator"[92] would also be affected

[91] Id. at 35-6.

[92] Nasca V.S. to SMART/TD-NY Opposition Statement 8.

by the line sale itself. Those employees would therefore be protected by the employee protection conditions contained in New York Dock as modified by Wilmington Terminal. Thus the imposition of Oregon Short Line protective conditions is unnecessary.

With regard to IAM's request that we hold NSR to the representations made in its application, the Board will impose a condition requiring NSR to adhere to its representation that it will implement the two voluntary commercial agreements discussed in the application, namely, the Transitional Divisions and Routing Agreement and the Direct Short Line Access Agreement. Beyond that, the Board presumes that NSR will abide by the representations made in its application; however, the Board will not impose a general condition to that effect because such a condition has not been shown to be necessary.

As for IAM's request that we monitor NSR's compliance post-transaction, on the record here, the Board does not find a monitoring condition necessary for this transaction. The Board does not anticipate any anticompetitive effects from this proposed transaction, as conditioned, nor have any parties raised concerns regarding potential operational difficulties in implementing NSR's acquisition of the D&H South Lines. Cf. Canadian Nat'l Ry.—Control—EJ&E W. Co., (CN/EJ&E 2008) FD 35087, slip op. at 25-26 (STB served Dec. 24, 2008).

National Grain and Feed Association. NGFA does not request any specific condition be placed on the proposed transaction, but does express concern with the potential effects of the transaction on grain and feed shippers who currently have access to NSR and D&H via the trackage rights that D&H has separately sought to discontinue.[93] NGFA asks the Board to closely examine both the D&H discontinuances and the scope of the Direct Short Line Access Agreement, and to consider additional measures "to ensure that shippers who currently enjoy access to both NS[R] and D&H via the D&H trackage rights at issue are not harmed by the transaction."[94] In response, NSR argues that NGFA has not shown actual competitive harm because it has not provided specific evidence to substantiate its concern.[95] NSR further points out that its competitive analysis shows that 90% of the traffic to which NGFA refers will already be subject to the Direct Short Line Access Agreement, and the remaining 10% "either originates or terminates on a 3-to-2 short line or station, terminates at an exclusive CP station located on the D&H South Lines, or originates at another station exclusively served by one railroad."[96]

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[93] NGFA states that "[t]he presence of CP via the D&H trackage rights provides a potentially competitive alternative to [NSR] as well as a general cap on the rates NS[R] can charge for service on its own account. Comments of the National Grain and Feed Association 2.

[94] Comments of the National Grain and Feed Association 4.

[95] NSR Response to Comments and Rebuttal in Support of Application (NSR-16) 27.

[96] Id. at 27-28, 57 (Mutén R.V.S. 2).

The Direct Short Line Access Agreement preserves commercial access to both NSR and D&H for customers on short lines connecting to the D&H South Lines. NGFA seems to suggest the Board should require the expansion of this agreement to cover the rail lines subject to the D&H Discontinuances. However, NGFA has provided no specific information to show that such a condition is necessary to address a specific adverse competitive effect of the transaction. In addition, NSR's analysis indicates that, even taking into account the D&H discontinuances, there will not be a loss of competitive options for grain, feed, and oilseed traffic as a result of the acquisition transaction.[97] Therefore the Board will not impose any conditions on the transaction based on NGFA's comments.

New York State Department of Transportation and Saratoga & North Creek Railway. NYSDOT and S&NC, a Class III short-line railroad, both support the proposed transaction. Nevertheless, NYSDOT states that S&NC's line connects with and has trackage rights over 1.1 miles of a D&H-owned line not subject to this transaction that allows S&NC to interchange with D&H at Saratoga Yard. Because S&NC's only connection to the rest of the national rail network is at Saratoga, NYSDOT raises concerns that, upon sale of the D&H South Lines, D&H will become a "bottleneck carrier to any domestic traffic originating or terminating on the S&NC."[98]

To mitigate this alleged anticompetitive effect, NYSDOT and S&NC both request that the transaction be conditioned upon the elimination of what they describe as a "paper barrier" preventing S&NC from interchanging with carriers other than D&H at Saratoga Yard.[99] NYSDOT and S&NC explain that S&NC is contractually prevented from interchanging with NSR at Saratoga Yard, and NSR is likewise contractually prevented from interchanging with S&NC there. NYSDOT argues that the ability of S&NC to interchange with another carrier in addition to D&H would provide competitive routing options that would mitigate D&H's status as a "bottleneck carrier" post-transaction. S&NC argues that its ability to interchange with an additional carrier at Saratoga Yard would enable it to rebuild traffic on its line, noting that it

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[97] Id. at 28.

[98] NYSDOT Comments and Request for Conditions 2. A bottleneck segment is the portion of a rail movement for which no alternative rail route is available; a bottleneck carrier is the sole railroad operating a bottleneck segment. Canexus Chemicals Canada L.P. v BNSF Ry. Co., NOR 42131, n.19 (STB served February 8, 2012). See also Cent. Power & Light Co. v. S. Pac. Transp. Co. (Bottleneck I), 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. Surface Transp. Bd., 169 F.3d 1099 (8th Cir. 1999).

[99] NYSDOT Comments and Request for Conditions 5-6. A paper barrier is an interchange commitment imposed by contract. Review of Rail Access & Competition Issues—Renewed Petition of the W. Coal Traffic League, EP 575, slip op. at 1 (STB served Oct. 30, 2007).

"believes that it could generate up to 8,000 cars of traffic per year if it could interchange directly with NSR."[100]

NSR objects that the condition requested improperly seeks to address pre-existing conditions.[101] D&H also opposes the requested condition and argues that allowing S&NC and NSR to interchange directly with each other at the Saratoga Yard would cause considerable problems in the yard by consuming capacity needed for other operations and adversely affecting D&H's ability to manage yard operations.[102]

These requested conditions will be denied. While NYSDOT states that D&H will become a bottleneck carrier for traffic originating or terminating on S&NC if this transaction is approved, the record indicates that this alleged bottleneck existed prior to this proceeding. NYSDOT admits that, currently, "S&NC's only connection to the remainder of the interstate network is at Saratoga, and their only connection is with D&H."[103] The condition requested by NYSDOT and S&NC is thus unrelated to the competitive effects of the proposed transaction.

In addition, S&NC and NYSDOT have not established that the Board should take action to address the alleged bottleneck, even assuming arguendo that it would be caused by the transaction (which it is not). The Board does not remedy all instances of bottleneck segments and carriers. Instead, where a bottleneck exists, a shipper can "seek to force an alternative routing that would include the line of the non-bottleneck carrier, if it [can] show, under 49 U.S.C. § 10705 and the Board's 'competitive access' rules . . . [,] that there would be sufficient benefits associated with the alternative routing." Policy Alts. to Increase Competition in the R.R. Indus., EP 688 2 (STB served April 14, 2009). See also Bottleneck I at 5, Bottleneck II at 2. S&NC has not made such a showing here.

The Board further notes that (1) NYSDOT admits that S&NC's situation is "not a true 'paper barrier,' as both S&NC and NS[R] negotiated their respective rights to interchange with D&H at Saratoga independently,"[104] and (2) the Board has not found all paper barriers, even those that are true paper barriers, de facto problematic, see, e.g., Review of Rail Access & Competition Issues, slip op. at 14 (considering restrictions on interchange commitments and

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[100] Comments and Request for Relief of the Saratoga & North Creek Railway 4, 5. See also Gonyo Verified Statement to Comments and Request for Relief of the Saratoga & North Creek Railway 3.

[101] NSR-16 18.

[102] Reply Comments of D&H 9, and Verified Statement of Kristan McMahon, id. at 3-4.

[103] NYSDOT Comments and Request for Conditions 2.

[104] Id. at 5.

concluding that "the Board should consider the propriety of interchange commitments on a case-by-case basis").

Furthermore, the traffic on the line that S&NC claims will be affected by the transaction is potential future traffic, not current traffic.[105] In addition, S&NC admits that this traffic would not be harmed by the proposed transaction but, instead, is harmed (or prevented) by S&NC's pre-existing inability to interchange with NSR at Saratoga Yard.[106] Indeed, the letters of support for S&NC's request (submitted by potential customers) confirm that S&NC's difficulty in developing traffic on its line result from S&NC's pre-existing interchange agreement with D&H.[107] S&NC may not use this transaction to improve its ability to attract customers and conduct business on its line, and the Board may not use its conditioning power to expand S&NC's competitive options. Thus, the Board denies NYSDOT and S&NC's requested condition.

PPL EnergyPlus LLC. Pennsylvania Power and Light (PPL) is an energy and utility holding company that operates the Montour Generating Station 20 miles north of Sunbury, Pa. The Montour Station is currently served exclusively by NSR. PPL does not connect to the D&H South Lines, though it is in geographical proximity to them. In its comments, PPL describes a long-term expansion strategy, including a potential build-out connecting the Montour Station to the D&H South Lines via rail. PPL requests that the Board impose conditions in this proceeding to facilitate PPL's use of its potential build-out to the D&H South Lines, in the event PPL constructs such a build-out. PPL argues that NSR's acquisition of the D&H South Lines would adversely affect PPL's potential transportation options and that PPL would become a 2-to-1 shipper because it would lose the competitive leverage provided by its ability to build a line to

[105] Comments and Request for Relief of the Saratoga & North Creek Railway 4 (stating that S&NC has been working "to develop traffic from the five potential on-line customers" (emphasis added)). See also id. at 5 (stating that if S&NC is allowed to interchange directly with NSR, "[n]o freight will be diverted from D&H as this traffic [is] 'new.' In fact, it is traffic that has not moved by rail in as many as about 25 years").

[106] Id. at 3 (stating that "S&NC has identified [five] potential freight customers that would benefit from a direct interchange with NSR.").

[107] See December 28, 2014 Letter from Barton International, Comments and Request for Relief of the Saratoga & North Creek Railway (stating that "[a] direct interchange with NS[R] at Saratoga would greatly benefit S&NC and its ability to grow traffic with competitive rates and service."), and January 20, 2015 Letter from NL Industries, Inc., Comments and Request for Relief of the Saratoga & North Creek Railway (describing issues with a past shipment conducted by S&NC for the company and stating that "[h]ad S&NC been able to interchange directly with NS[R], we could have eliminated these delays and saved on switching fees as well.").

connect with the D&H South Lines (and thus to D&H) in order to compete with NSR.[108] Contingent upon PPL building rail line to a point of connection with the D&H South Lines, PPL requests two conditions: (1) that the Board require NSR to negotiate trackage or haulage agreements with CSXT and PPL for the movement of loaded and empty trains over the D&H South Lines to and from the Montour Station; and (2) that the Board require NSR to negotiate a new haulage agreement with CP for PPL traffic routed over the Southern Tier via Buffalo and Binghamton, N.Y.[109] The first condition would allow PPL to ship on CSXT via Albany, Schenectady, and Selkirk, N.Y.; the second condition would allow PPL to ship on NSR via the Southern Tier. PPL requests that the Board adopt both of these conditions and allow PPL to choose one of them once PPL's build out track is in place.[110]

NSR opposes PPL's requests. NSR claims that PPL's build-out option does not actually constrain NSR's rates, because, in its view, NSR's rates are primarily constrained by the price of natural gas and other macroeconomic factors, as well as potential intermodal competition from a truck interchange.[111] NSR also questions whether the proposed build-out is actually feasible.[112] Moreover, NSR states that providing PPL with access to CP and CSXT, in addition to its current service from NSR, would not preserve competition, but enhance it, contrary to the purpose of Board-imposed conditions.[113] NSR argues that, if the Board does grant PPL a build-out condition, it should be narrowly tailored only to grant PPL the option to reach D&H by, for example, granting trackage rights to D&H from Schenectady, N.Y. to the build-out.[114]

Contrary to NSR's claims with regard to PPL's proposed build-out, the Board finds that PPL's potential loss of D&H as a competitor to NSR is real. Though other factors, including natural gas rates and intermodal competition, may also serve to constrain NSR's rates with PPL, the proposed acquisition transaction would still deprive PPL of a potential alternative to NSR. While NSR contends that PPL's proposed build-out may not be operationally feasible, PPL is not required to demonstrate the feasibility of its build-out for us to grant a condition that would

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[108] Comments and Requests for Conditions of PPL EnergyPlus LLC 7-9.

[109] Id. at 12.

[110] Id. at LLC 13. PPL argues this is appropriate because "[a]t this time, it cannot be determined which of the two routings would prove most effective over the long term, and it is quite plausible that each would be used for different traffic (*e.g.* the Buffalo-Binghamton route for Eastern coal, and the Albany/Schenectady/Selkirk route for Western Coal)." Id.

[111] NSR-16 69-71 (Zehringer V.S. 2-4). See also id.at 30-31.

[112] Id. at 29.

[113] Id. at 31.

[114] Id. at 32.

facilitate PPL's use of a potential build-out, if constructed.[115] However, although we agree that PPL's pre-transaction competitive options should be protected, the two conditions that PPL requests clearly seek to improve PPL's competitive position with regard to its future expansion plans to service the Midwest and other areas of the country. They are not appropriate conditions to impose in the context of this transaction, given that the Board's conditioning power is limited to preserving competitive options that may be foreclosed by a transaction, not increasing the competitive options for a specific carrier. See BN/SF Merger 1995, 10 I.C.C.2d at 57, and CN/IC, slip op. at 20.

Therefore we will deny PPL's requested conditions, but we will grant PPL a narrowly tailored condition consistent with NSR's suggestion. In particular, the Board's condition will provide that, contingent upon PPL actually constructing a connection to the D&H South Lines, the Board will grant D&H trackage rights over the D&H South Lines from that point of PPL's connection with the D&H South Lines to Schenectady, N.Y. This condition is appropriate to preserve PPL's pre-transaction competitive options by providing continued potential access to D&H, without expanding PPL's competitive options beyond the pre-transaction status quo.

Related Filings

The notices of exemption filed by NSR in Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway Company, Inc., FD 34209 (Sub-No. 1), and Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway Company, Inc., FD 34562 (Sub-No. 1) were both filed pursuant to 49 C.F.R. § 1180.2(d)(7) and the procedures at 49 C.F.R. § 1180.4(g). Pursuant to those regulations, the Board exempts the acquisition or renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier that are based on written agreements and not filed or sought in a responsive application in a rail consolidation proceeding. The two notices filed by NSR here clearly fall within this class exemption, and therefore the Board will allow the two embraced notices of exemption to take effect on the effective date of this decision, subject to employee protective conditions as discussed below.

Labor Protection

Under 49 U.S.C. § 11326(a), we must impose labor protective conditions on our approval of this transaction. As discussed above, the appropriate labor protective conditions to impose are those set out in New York Dock as modified by Wilmington Terminal because this transaction is a line sale under 49 U.S.C. § 11323(a)(2), not a transaction involving merger or common control.

[115] In any event, the feasibility of a build-out itself is ultimately measured by "whether the line is actually constructed . . . ." CN/EJ&E 2008, slip op. at 14. See also UP/SP Merger 1996, 1 S.T.B. at 420.

See, e.g., Union Pac. R.R.— San Pedro R.R. Operating Co., Union Pac. R.R.—Brownsville & Matamoros Bridge Co., BNSF Ry.— Neb. Ne. Ry., Mass. Coastal 2010.

In addition, as discussed above, the two related notices of exemption are subject to labor protection as set forth in N&W/Mendocino.

Environmental Issues

The traffic levels involved in the proposed acquisition transaction fall below the Board's thresholds for environmental review in 49 C.F.R. § 1105.7(e)(4) and (5). Therefore, this transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2), and no environmental review is necessary or required. Furthermore, no historic review is required for this line sale. See 49 C.F.R. § 1105.8(b)(1) & (3).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In FD 35873, NSR's application to acquire the D&H South Lines is approved.

2. SMART/TD-NY's petition for reconsideration is denied.

3. James Riffin's January 13, 2015 motion to stay is denied.

4. SMART/TD-NY's petition for leave to file its petition to strike and/or for alternative relief is granted. SMART/TD-NY's petition to strike and/or for alternative relief is denied with respect to both its petition to strike and with respect to its request for alternative relief.

5. SMART/TD-NY's motion to compel is denied.

6. James Riffin's May 14, 2015 motion to stay is denied.

7. Approval of the acquisition transaction in FD 35873 is subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991).

8. Applicants must adhere to their representation that they will implement the two voluntary commercial agreements discussed in their application, the Transitional Divisions and Routing Agreement and the Direct Short Line Access Agreement.

9. Contingent upon PPL constructing a rail line to a point of connection with the D&H South Lines, the Board will grant trackage rights to D&H from that point of connection to Schenectady, N.Y.

10. Any condition requested by any party in the FD 35873 proceeding that has not been specifically approved in this decision is denied.

11. In FD 34209 (Sub-No. 1), the modified trackage rights referenced in the notice filed on November 17, 2014, are authorized pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7).

12. In FD 34652 (Sub-No. 1), the modified trackage rights referenced in the notice filed on November 17, 2014, are authorized pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7).

13. The notices of exemption filed in FD 34209 (Sub-No. 1) and FD 34652 (Sub-No. 1) are subject to the employee protective conditions set out in Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

14. Petitions for reconsideration in this matter must be filed by June 4, 2015. Requests for stay must be filed by June 4, 2015.

15. This decision will be effective on June 14, 2015.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.